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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

IN RE: PATRICK F. MESSING, AND NORA B. MESSING,

Debtors

ANN MOSTOLLER, TRUSTEE,

Petitioner,

vs.

PATRICK F. MESSING,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Is a bankruptcy debtor's interest in a pension plan qualified under the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001 *et seq.*, excluded from the bankruptcy estate pursuant to 11 U.S.C. § 541(c)(2)?

II. Does the "plain meaning" rule apply to an inherently ambiguous federal statute, when the "plain meaning" renders another section of the same statute superfluous, is contrary to the purpose and policy of the statute, and is not in accordance with congressional intent as evidenced in the legislative history?

LIST OF PARTIES

The parties to the proceeding in the Sixth Circuit were petitioner, Ann Mostoller, Trustee, and the debtor, Patrick F. Messing. Although the debtor Nora B. Messing was a nominal defendant in the caption of the Sixth Circuit proceedings, only Patrick F. Messing made the disputed claim of exemption in the bankruptcy court, only Patrick F. Messing cross-appealed to the district court, and only Patrick F. Messing appealed to the Sixth Circuit. In the bankruptcy court, Nora B. Messing was represented by the same attorneys who represent her husband, Patrick F. Messing.

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Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Ann Mostoller, Trustee, respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Sixth Circuit to review the opinion and order of that court entered on August 22, 1991, as amended by the opinion and order entered on September 24, 1991.

OPINIONS BELOW

The per curiam opinion of the Sixth Circuit was originally issued on August 22, 1991, and was designated

"Not Recommended for Full-Text Publication." In response to Petitioner's Motion to Amend Opinion to correct a factual misstatement, the Sixth Circuit reissued the opinion, with the appropriate corrections, on September 24, 1991, again designated "Not Recommended for Full-Text Publication." The only changes made in the September 24, 1991, opinion related to the factual misstatement called to the court's attention by the Motion to Amend Opinion. The September 24, 1991 opinion is reproduced in Appendix A, at page App. 1.

The Order of the United States District Court for the Eastern District of Tennessee is unreported and is reproduced in Appendix B, at page App. 7.

The "Memorandum on Trustee's Objection to Debtor's Claim of Exemption in ERISA-Qualified Pension Benefit Plan" issued by the United States Bankruptcy Court for the Eastern District of Tennessee is reported at 114 B.R. 541 and is reproduced in Appendix C, at page App. 14. The Order of the bankruptcy court is also reproduced in Appendix C, at page App. 38.

JURISDICTION

The original opinion of the Sixth Circuit was filed on August 22, 1991. A timely Petition for Rehearing and Suggestion for Rehearing *En Banc* was filed, and was denied by the Sixth Circuit by Order entered October 10, 1991. The Order denying rehearing is reproduced in Appendix D, at page App. 40. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Pursuant to Sup. Ct. R. 14.1(f), the pertinent text of the statutes cited here is set forth in Appendix E at page App. 42:

11 U.S.C. § 541(a)(1), (c) (1988);
11 U.S.C. § 522(b), (d)(10)(E) (1988);
26 U.S.C. § 401(a)(13) (1988);
29 U.S.C. § 1056(d)(1) (1988);
29 U.S.C. § 1144(d) (1988).

STATEMENT OF THE CASE

The issue in this case concerns the interrelationship of two federal statutes. Section 541 of the Bankruptcy Code (11 U.S.C. § 541 (1988 & Supp. II 1990)) defines the "property" which comes into the bankruptcy "estate" which is created when a debtor files a bankruptcy petition. This "estate" constitutes the assets which can be administered for the benefit of creditors. Section 541(c)(2) excludes from the bankruptcy estate property subject to a transfer restriction "that is enforceable under applicable nonbankruptcy law." In order to qualify for favorable tax treatment, employee pension plans established under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001 *et seq.* (1988 & Supp. I 1989), must contain certain restrictions on alienation of the plan benefits. *See* 29 U.S.C. § 1056(d)(1) (1988); 26 U.S.C. § 401(a)(13) (1988). The majority view construes § 541(c)(2) of the Bankruptcy Code to exclude ERISA-qualified pension interests from the bankruptcy estate

only when the ERISA plan nonalienation provisions satisfy the requirements of a spendthrift trust under state law. The minority view construes § 541(c)(2) to exclude all ERISA-qualified pension interests from the bankruptcy estate. The issue in this case arises every time a person who has an interest in an ERISA-qualified pension plan files bankruptcy.

This is a bankruptcy appeal. The § 541(c)(2) issue presented here did not arise until the case was on appeal to the Sixth Circuit. The debtors, Patrick F. Messing and Nora B. Messing, filed a petition for relief under Chapter 7 of the Bankruptcy Code on July 12, 1989. The debtor, Patrick F. Messing (hereafter referred to as the "debtor"), claimed an *exemption* of all of the proceeds of his ERISA-qualified pension plan in the amount of $6,365.45. For statutes creating the exemption, the debtor relied upon state law at Tenn. Code Ann. § 26-2-104(b) and, alternatively, upon 29 U.S.C. § 1056(d), 29 U.S.C. § 1144(a), and 11 U.S.C. § 522(b)(2)(A). Respecting the latter statute, the debtor asserted that ERISA § 206(d)(1) and Internal Revenue Code § 401(a)(13) established a federal nonbankruptcy exemption available to him under Bankruptcy Code § 522(b)(2)(A). *In re Messing*, 114 B.R. 541, 545 (Bankr. E.D. Tenn. 1990), *reprinted in* Appendix C at App. 24-25. The trustee objected to the debtor's exemption on the grounds that ERISA preempts the state law and that ERISA provides no federal nonbankruptcy exemption. *Id.* at 542, *reprinted at* App. 15. The parties filed Stipulations in the bankruptcy court, which were summarized and adopted by the bankruptcy court as its findings of fact. *Id.* None of these findings of fact was held to be clearly erroneous by the district court. *See*

Appendix B at App. 7-8. The stipulated facts, as "synopsized" by the bankruptcy court, 114 B.R. at 542 n.3, *reprinted at* App. 15, are as follows:

> 1. The debtor is a beneficiary of a pension benefit plan (Plan) established by his employer under § 401(k) of the Internal Revenue Code (IRC) (26 U.S.C.A. § 401(k) (West Supp. 1990)).
>
> 2. The Plan is an ERISA-qualified plan, qualifying under IRC § 401(a) (26 U.S.C.A. § 401(a) (West Supp. 1990)).
>
> 3. The Plan contains the anti-assignment and anti-alienation provisions required by ERISA § 206(d) (29 U.S.C.A. § 1056(d) (West Supp. 1990)) and IRC § 401(a)(13) (26 U.S.C.A. § 401(a)(13) (West Supp. 1990)).
>
> 4. The debtor's interest in the Plan on July 12, 1989, the date he and his wife filed their joint petition under Chapter 7, was $6,365.45.
>
> 5. On the date his bankruptcy petition was filed, the debtor was thirty-one years old, employed by J.B.F. Associates, Inc., was not receiving benefits under the Plan, and had never made or received any withdrawals or distribution from the Plan.

Id. at 542, *reprinted at* App. 15-16.

The bankruptcy court allowed the exemption, holding that ERISA preempts the state exemption statute, but that ERISA § 206(d) establishes a federal nonbankruptcy exemption available to the debtor under Bankruptcy Code § 522(b)(2)(A). *Id.* at 550, *reprinted at* App. 36. The trustee appealed to the district court from the bankruptcy court's holding of a federal nonbankruptcy exemption.

The debtor cross-appealed from the bankruptcy court's holding that ERISA preempts the state law exemption. The district court reversed the judgment of the bankruptcy court, adopting the majority view and holding that "Congress had no intention of creating a mechanism through which debtors could shelter money from the reach of bankruptcy creditors." Appendix B at App. 12. The debtor appealed to the Sixth Circuit.

Although the debtor never contended in the bankruptcy or district courts that his ERISA-qualified plan interest was *excluded* from the bankruptcy estate under § 541(c)(2) of the Bankruptcy Code, the debtor raised the exclusion issue for the first time in the Sixth Circuit, relying on that court's decision in *Forbes v. Lucas (In re Lucas)*, 924 F.2d 597 (6th Cir.), *cert. denied*, 111 S. Ct. 2275 (1991). The Sixth Circuit panel, rejecting the trustee's waiver argument and following *In re Lucas*, held that the debtor's pension interest was excluded from the bankruptcy estate under 11 U.S.C. § 541(c)(2). Appendix A at App. 3, 6. Because of its holding on the exclusion issue, the court did not reach the exemption issue. Appendix A at App. 3. The trustee filed a Petition for Rehearing and Suggestion for Rehearing *En Banc*, which was denied. Appendix D at App. 40.

REASONS FOR GRANTING THE WRIT

The Sixth Circuit's decision in this case is in accord with a decision of the Fourth Circuit, but directly conflicts with decisions of four other Circuits, the Fifth,

Eighth, Ninth, and Eleventh. Furthermore, the Sixth Circuit's decision in this case is erroneous because it ascribes a "plain meaning" to a statute that is ambiguous, a "plain meaning" which renders another section of the Bankruptcy Code superfluous, which disregards congressional intention as evidenced in the legislative history, and which undermines the purpose and policy of the Bankruptcy Code. The issue presented here recurs frequently and has a significant impact on the administration of the Bankruptcy Code. Therefore, it would be appropriate for this Court to grant certiorari to resolve the split among the Circuits and to reestablish the uniformity of the bankruptcy laws of the United States that has been destroyed by the minority view represented by the Sixth Circuit's decision here.

This Court has twice before denied certiorari in cases raising the issue of whether a bankruptcy debtor's ERISA-qualified pension interest is excluded from the estate under 11 U.S.C. § 541(c)(2). *See Daniel v. Security Pacific Nat'l Bank*, 771 F.2d 1352 (9th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986); *Forbes v. Lucas (In re Lucas)*, 924 F.2d 597 (6th Cir.), *cert. denied*, 111 S. Ct. 2275 (1991). Why, then, should this Court grant certiorari in this, the third case raising the exclusion issue?

The *Daniel* case arose before any real split among the Circuits had developed; the cases cited by petitioner as conflicting with the Ninth Circuit's decision there were not on point. Petition for Writ of Certiorari at 9-12, *Daniel v. Security Pacific Nat'l Bank*, 475 U.S. 1016 (1986) (No. 85-1075). The *Forbes v. Lucas (In re Lucas)* case was arguably not ripe for review. Because there had been no finding in the lower courts that the debtor's pension plan was in

fact ERISA-qualified, the Sixth Circuit remanded the case for such a factual determination. *See In re Lucas,* 924 F.2d at 598. Since the exclusion issue presented here arises only in the context of an ERISA-qualified pension plan, the *Lucas* case was arguably not ripe for review in the absence of a finding of ERISA qualification.

Neither of these obstacles bars review in this case. This case is ripe, the bankruptcy court having clearly held that the debtor's pension interest is ERISA-qualified, 114 B.R. at 542, *reprinted at* App. 15-16, and the district court having accepted the bankruptcy court's finding on this point, *see* Appendix B at App. 7-8. Furthermore, as discussed more fully below, in the years since *Daniel,* a clear and ever-deepening split among the Circuits has developed on the precise issue presented here.

I. The Court of Appeals' Decision Directly Conflicts with Decisions of the Fifth, Eighth, Ninth, and Eleventh Circuits.

In a consistent, well-reasoned line of cases from 1983 to 1990, the Fifth, Eighth, Ninth, and Eleventh Circuits held that only interests in ERISA-qualified plans which constitute spendthrift trusts under state law are excluded from the bankruptcy estate under § 541(c)(2). *Brooks v. Interfirst Bank (In re Brooks),* 844 F.2d 258 (5th Cir. 1988); *Goff v. Taylor (In re Goff),* 706 F.2d 574 (5th Cir. 1983); *Samore v. Graham (In re Graham),* 726 F.2d 1268 (8th Cir. 1984); *John Hancock Mutual Life Ins. Co. v. Watson (In re Kincaid),* 917 F.2d 1162 (9th Cir. 1990); *Daniel v. Security Pacific Nat'l Bank (In re Daniel),* 771 F.2d 1352 (9th Cir. 1985), *cert. denied,* 475 U.S. 1016 (1986); *Lichstrahl v.*

Bankers Trust (In re Lichstrahl), 750 F.2d 1488 (11th Cir. 1985).

In 1990, the Fourth Circuit rejected the majority view in *Anderson v. Raine (In re Moore)*, 907 F.2d 1476 (4th Cir. 1990), and held that a debtor's interest in an ERISA-qualified pension plan was excluded from the bankruptcy estate irrespective of state spendthrift trust requirements. No petition for certiorari was filed in that case. The Fourth Circuit has recently interpreted its *In re Moore* decision to mean that, for § 541(c)(2) purposes, "all ERISA-qualified plans, which by definition have a non-alienation provision, constitute 'applicable non-bankruptcy law' and contain enforceable restrictions on the transfer of pension interests." *Shumate v. Patterson*, 943 F.2d 362, 365 (4th Cir. 1991). In 1991, the Sixth Circuit followed the Fourth Circuit's minority view on this issue. *Forbes v. Lucas (In re Lucas)*, 924 F.2d 597 (6th Cir.), *cert. denied*, 111 S. Ct. 2275 (1991). In the instant case, the Sixth Circuit found *In re Lucas* to be "still good law and controlling" and held that "the debtor is entitled to a full exclusion of his ERISA pension benefits from his bankruptcy estate." Appendix A at App. 6.

This clear conflict among the Circuits shows no sign of resolving itself. Only recently the Fifth Circuit reaffirmed its allegiance to the majority view, *Heitkamp v. Dyke (In re Dyke)*, 943 F.2d 1435 (5th Cir. 1991), while the Fourth Circuit reaffirmed its allegiance to the minority position, *Shumate v. Patterson*, 943 F.2d 362 (4th Cir. 1991). Congress is empowered "To establish . . . *uniform* Laws on the subject of Bankruptcies throughout the United States." U.S. Const., art. I, § 8, cl. 4 (emphasis added). The minority view represented by the decision in this case has

rendered the bankruptcy laws of the United States non-uniform. The courts of appeals themselves recognize that the two lines of cases are irreconcilable, *see, e.g., In re Dyke*, 943 F.2d at 1441 & n.18, and therefore, the two lines of decisions will lead to disparate results each time a debtor owning an ERISA-qualified pension interest files a bankruptcy petition.

II. This Issue Affects Thousands of Debtors and Creditors and Significantly Affects Administration of the Bankruptcy Code.

In 1988, the total number of active participants in ERISA-qualified pension plans was 63.6 million. Contributions to these pension plans totalled $100.5 billion. U.S. Dep't of Commerce, *Statistical Abstract of the United States* table 596, at 365 (11th ed. 1991). In 1988, the total number of nonbusiness bankruptcies filed was 526,066. *Id.* table 884, at 538. In 1989, nonbusiness bankruptcy filings increased by 10.3%, to 580,459. Administrative Office of the United States Courts, *Annual Report of the Director* table 9, at 27 (1989). In 1990, nonbusiness bankruptcy filings increased another 13.8%, to 660,796. *Id.* table 13, at 23 (1990). The relative significance of ERISA-qualified assets to the administration of the Bankruptcy Code is demonstrated by the fact that nonbusiness filings represent a growing percentage of bankruptcies: "In 1985, nonbusiness filings represented 82 percent of the total filings; by 1990, they had grown to 91 percent of the total." *Id.* at 22. Even if only a fraction of the bankruptcy debtors own only a fraction of the billions of dollars contributed to ERISA-qualified pension plans, the economic impact of this issue is apparent.

While the amount of money at issue here ($6,365.45) is relatively small, the amounts of money involved in these cases can be enormous, especially when it is remembered that professionals can set up their own ERISA-qualified plans and freely transfer assets to those plans. Under the minority view, those assets, no matter how great, will never come into the bankruptcy estate to be administered for the benefit of creditors. For example, in *In re Velis*, 123 B.R. 497 (D.N.J. 1991), the debtor, an orthopedic surgeon, established a professional corporation which in turn established ERISA-qualified IRA's, a Keogh plan, and a pension plan for its employees and the debtor's wife. At the time the debtor filed bankruptcy, his ERISA-qualified interests totalled $355,578.00. *Id.* at 501. The debtor argued that these assets should be excluded from his bankruptcy estate under § 541(c)(2) of the Bankruptcy Code. *Id.* at 500. The district court, noting that the Third Circuit has not decided the issue, adopted the majority view and held that the assets did become part of the estate. *Id.* at 503-10. Had the district court followed the Sixth Circuit's view, however, none of the $355,578.00 would have been available to creditors because it would never have come into the bankruptcy estate. This one example demonstrates the economic impact (multiplied many times over) that the decision of this issue can have for individual debtors and creditors and for administration of the Bankruptcy Code.

III. The Court of Appeals Has Erroneously Interpreted the Phrase "Applicable Nonbankruptcy Law" in 11 U.S.C. § 541(c)(2).

Both the Fourth and Sixth Circuits have declared that their interpretation of § 541(c)(2) is required by the "plain

meaning" of the statute. *See In re Moore*, 907 F.2d at 1477; *In re Lucas*, 924 F.2d at 600-01. However, this minority view errs in ascribing a "plain meaning" to a statute that is inherently ambiguous. By purporting to find a "plain meaning" in the language of the statute and refusing to look to the legislative history to discern Congress' intent, the minority view has rendered another section of the Bankruptcy Code superfluous and has undermined the congressional policy and purpose underlying the Bankruptcy Code. Thus, resolution of the issue in this case implicates the issue of how a federal court must properly interpret a federal statute.

Both the majority view that a debtor's interest in an ERISA-qualified pension plan is property of the estate and the minority view to the contrary first cite Bankruptcy Code § 541(a)(1), which provides that the bankruptcy estate consists of "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1) (1988). Both views agree that this provision is "broad in scope." *In re Lucas*, 924 F.2d at 600 (citing *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 204-05 (1983)). Both views next cite Bankruptcy Code § 541(c)(1)(A), which provides that "an interest of the debtor in property becomes property of the estate . . . notwithstanding any provision . . . (A) that restricts or conditions transfer of such interest by the debtor[.]" 11 U.S.C. § 541(c)(1)(A) (1988). Both views recognize that § 541(c)(2) constitutes an exception to subsection (c)(1)(A) by providing: "A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under *applicable nonbankruptcy law* is enforceable in a case under this title." *Id.* § 541(c)(2) (emphasis added). The two

views differ on the meaning of the term "applicable nonbankruptcy law."

The majority view recognizes, as did the district court in *In re Velis*, that the phrase "applicable nonbankruptcy law" is "a ubiquitous catchall phrase that is statute-specific due to use of the qualifying adjective 'applicable.' " 123 B.R. at 507 (footnote omitted). Because the Bankruptcy Code itself neither defines "applicable" nor enumerates which nonbankruptcy law Congress intended to be "applicable" for § 541(c)(2) purposes, the majority has looked to legislative history to clarify Congress' intent, and has determined that Congress intended to exclude ERISA-qualified interests only when they satisfy state spendthrift trust requirements. *See, e.g., In re Goff*, 706 F.2d at 580; *In re Graham*, 726 F.2d at 1271-72; *In re Daniel*, 771 F.2d at 1360; *In re Lichstrahl*, 750 F.2d at 1490. In contrast, the minority view has rejected any resort to the legislative history as a guide to Congress' intention: "An appeal to legislative history is inappropriate here because the language of § 541(c)(2) is clear." *In re Moore*, 907 F.2d at 1478. In the Fourth Circuit's words, adopted by the Sixth Circuit in *In re Lucas*, found to be controlling in this case, " 'Applicable nonbankruptcy law' means precisely what it says: all laws, state and federal, under which a transfer restriction is enforceable." *Id.* at 1477, *quoted in In re Lucas*, 924 F.2d at 601. Thus, because an ERISA plan is required to contain certain transfer restrictions, the minority view holds that "all ERISA-qualified plans, which by definition have a non-alienation provision, constitute 'applicable nonbankruptcy law' and contain enforceable restrictions on the transfer of pension interests." *Shumate v. Patterson*, 943 F.2d at 365. The

minority view further holds that, in any case, the legislative history on the meaning of "applicable nonbankruptcy law" is "inconclusive." *In re Moore*, 907 F.2d at 1479; *In re Lucas*, 924 F.2d at 602.

The minority view is wrong, first, because it ignores the overall structure of the Bankruptcy Code, fails to harmonize the various provisions of the Code, and renders another section of the Code superfluous. The architecture of the Bankruptcy Code clearly shows that Congress intended to include a debtor's interest in an ERISA-qualified plan as property of the bankruptcy estate. Under the general rule, as qualified above, all "legal and equitable" interests of the debtor become "property of the estate available to satisfy the creditors' claims." *Payne v. Wood*, 775 F.2d 202, 204 (7th Cir. 1985), *cert. denied*, 475 U.S. 1085 (1986). After the property comes into the bankruptcy estate, "[t]he debtor then may remove some of the property by claiming exemptions under 11 U.S.C. § 522(b)." *Id.* At Bankruptcy Code § 522(d), Congress sets forth a federal scheme of exemptions for debtors in states which have not opted out of the federal exemptions. 11 U.S.C. § 522(b)(1), (d) (1988). Congress sets forth an exemption for a debtor's interest in an ERISA-qualified plan but restricts the exemption to "the extent reasonably necessary for the support of the debtor and any dependent of the debtor." *Id.* § 522(d)(10)(E). It makes no sense for Congress to have enacted a restrictive device for a debtor to remove ERISA benefits from his bankruptcy estate if those benefits never become part of his estate. No debtor would ever use Congress' restrictive exemption when he can keep all of his private pension benefits anyway under the minority view. The minority

view thus renders 11 U.S.C. § 522(d)(10)(E) superfluous, violating " 'the elementary canon of construction that a statute should be interpreted so as not to render one part inoperative.' " *Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985) (quoting *Colautti v. Franklin*, 439 U.S. 379, 392 (1979)).

The minority view is wrong, secondly, because it purports to find a "plain meaning" in an inherently ambiguous statute. This is not a case like *Union Bank v. Wolas*, 60 U.S.L.W. 4043 (U.S. Dec. 11, 1991), in which the real source of uncertainty about the statute's meaning was extrinsic to the text. Here the phrase "applicable nonbankruptcy law" in Bankruptcy Code § 541(c)(2) is inherently ambiguous. A question *per se* exists as to whether ERISA constitutes "nonbankruptcy law" that is "applicable" to bankruptcy. If Congress had intended for every nonbankruptcy federal law to be applied in the bankruptcy context, it would not have qualified the phrase "nonbankruptcy law" with the term "applicable." The minority view misuses the phrase "applicable nonbankruptcy law" as "a term of art capable of uniform meaning." *In re Velis*, 123 B.R. at 507. The minority view erroneously compares Congress' use of the phrase in Bankruptcy Code § 541(a) for ERISA-qualified plans with its use of the phrase in other parts of the Bankruptcy Code when referring to both state and federal law. *See In re Lucas*, 924 F.2d at 601. However, ERISA itself prescribes that it is not "applicable" nonbankruptcy law by expressly providing that it cannot serve to "alter, amend, modify, invalidate, impair, or supersede any law of the United States. . . . " 29 U.S.C. § 1144(d) (1988). The minority view contravenes this express provision of

ERISA because it allows the anti-assignment and anti-alienation provisions prescribed by ERISA to modify, impair, or supersede Bankruptcy Code § 541(c).

Thus, in this case, even without resort to the legislative history, the Sixth Circuit's view is demonstrably erroneous. Both ERISA, at 29 U.S.C. § 1144(d), and the Bankruptcy Code, at 11 U.S.C. § 522(d)(10)(E), evidence congressional intent that ERISA does not constitute "applicable nonbankruptcy law" which excludes a debtor's interest in an ERISA-qualified plan from the bankruptcy estate. However, because the meaning of § 541(c)(2) is "obscured by ambiguity," in this case "[l]egislative history can be a legitimate guide" to congressional intent. *Burlington Northern R.R. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 461 (1987). In contrast to cases like *TVA v. Hill*, 437 U.S. 153 (1978), in which the legislative history confirmed the "plain meaning" interpretation, here the legislative history directly contradicts the Sixth Circuit's reading of § 541(c)(2).

Unlike the minority's "superficial" examination of the legislative history, *In re Velis*, 123 B.R. at 507, a thorough review of the legislative history confirms the conclusion that Congress did not intend the term "applicable nonbankruptcy law" to encompass ERISA. From the very inception of the Bankruptcy Code, *exclusion* was viewed as appropriate only for spendthrift trusts, while ERISA interests were treated as a matter of *exemption* from the bankruptcy estate. Section 541(c)(2) had its genesis in the spendthrift trust section of the Report of the Commission on the Bankruptcy Laws of the United States. Report of the Commission on the Bankruptcy Laws of the United States, H.R. Doc. No. 137, 93d Cong., 1st Sess., pt. 1, at

197-98 (1973), *reprinted in* [Appendix 2] Lawrence P. King, ed., *Collier on Bankruptcy* I-1, at 197-98 (15th ed. 1990) (hereinafter cited as "King"). The Commission proposed that the new Code, unlike the Bankruptcy Act, not define property in terms of transferability. However, § 4-601(b) of the proposed Act sought to exclude from the bankruptcy estate a beneficial interest of a debtor in a trust for his support "to the extent of the income reasonably necessary for the support of the debtor and his dependents." *Id.* pt. 2, at 147-48, *reprinted in* [Appendix 2] King, PII-i, at 147-48. Notes 5 and 10 to § 4-601(b), as well as the Commission's statement in support of its proposals, clearly indicate that the Commission was addressing only traditional spendthrift and support trusts. *Id.* at 150, 151, *reprinted in* [Appendix 2] King PII-i, at 150, 151; *id.*, pt. 1, at 197-98, *reprinted in* [Appendix 2] King I-1, at 197-98.

The Commission also proposed in § 4-503(c)(6) that a debtor could *exempt* his interest in an ERISA-qualified plan "to the extent . . . reasonably necessary for the support of the debtor and his dependents." *Id.* pt. 2, at 125, *reprinted in* [Appendix 2] King PII-i, at 125. Note 8 to § 4-503 delineated the treatment for spendthrift trusts and pensions: A debtor's interest in a spendthrift trust would be subject to *exclusion* from the bankruptcy estate under § 4-601(b), while a debtor's interest in an ERISA-qualified plan would be subject to *exemption* under § 4-503(c)(6). *Id.* at 129, *reprinted in* [Appendix 2] King PII-i, at 129. In Note 8 to § 4-503, the Commission articulated its concern that a limit was necessary on exemption for a debtor's interest in an ERISA-qualified plan because a debtor could accumulate "very substantial benefits." *Id.* Eventually, Congress enacted § 4-601(b) of the Commission's proposed

Act (the spendthrift trust exclusion section) as Bankruptcy Code § 541(c)(2) and enacted § 4-503(c)(6) (the exemption for ERISA-qualified interests) as Bankruptcy Code § 522(d)(10)(E) with the limitation "to the extent necessary for the reasonable support of the debtor and his dependents."

One bill introduced in the House would have eliminated any exclusion for trust or any other property from the bankruptcy estate. H.R. 6, 95th Cong., 1st Sess., sec. 101, § 541(c)(1) (1977). Other bills, like the Commission proposal, contained separate provisions *excluding* trust property and *exempting* a debtor's retirement interest. The bills differed as to whether a "necessary support" limitation should be included in either the exclusion for trusts or the exemption for a debtor's interest in an ERISA-qualified plan. *Compare* H.R. 32, 94th Cong., 1st Sess., sec. 1, §§ 4-503(c)(5), 4-601(b) (1975) (which would have eliminated necessary support requirement from exemption section but would have retained it for exclusion section) *with* H.R. 31, 94th Cong., 1st Sess., sec. 1, §§ 4-601(b), 4-503(c)(6) (1975) (which would have retained necessary support requirement for both exclusion of trusts and exemption of ERISA-qualified interests).

The immediate progenitor of the Bankruptcy Code, H.R. 8200, contained the precise language of § 541(c)(2) as ultimately enacted, but omitted from § 522(d)(10)(E) (the exemption section) the "reasonable support" limitation ultimately enacted. H.R. 8200, 95th Cong., 1st Sess. sec. 101, §§ 541(c)(2), 522(d)(10)(E) (1977), *reprinted in* [Appendix 3] King PIII-1, at 411, 398. With respect to § 541(c)(2), the House Report accompanying H.R. 8200 explained:

> The bill also continues over the exclusion from property of the estate of the debtor's interest in a spendthrift trust to the extent the trust is protected from creditors under applicable State law. The bankruptcy of the beneficiary should not be permitted to defeat the legitimate expectations of the settlor of the trust.

H.R. Rep. No. 595, 95th Cong., 1st Sess. 176 (1977) (footnote omitted), *reprinted in* 1978 U.S. Code Cong. & Ad. News 5963, 6136. In the section-by-section analysis of the bill, the Report also noted:

> Subsection (c) invalidates restrictions on the transfer of property of the debtor, in order that all of the interests of the debtor in property will become property of the estate. . . . Paragraph (2) of subsection (c), however, preserves restrictions on transfer of a spendthrift trust to the extent that the restriction is enforceable under applicable nonbankruptcy law.

Id. at 369, *reprinted in* 1978 U.S. Code Cong. & Ad. News 5963, 6325. With respect to § 522(d)(10)(E), the Report stated, "Paragraph (10) exempts certain benefits that are akin to future earnings of the debtor. These include . . . benefits under a certain stock bonus, pension, profitsharing, annuity or similar plan based on illness, disability, death, age or length of service." *Id.* at 362, *reprinted in* 1978 U.S. Code Cong. & Ad. News 5963, 6318.

Rather than considering H.R. 8200, the Senate passed its own bill, S. 2266, in the nature of a substitute to H.R. 8200. Section 541(c)(2) of S. 2266 restricted the exclusion of trust property "to the extent of the income reasonably necessary for the support of the debtor and his dependents," but contained no specific exemption for pension

benefits. S. 2266, 95th Cong., 2d Sess. sec. 101, §§ 541(c)(2), 522 (1978), *reprinted in* [Appendix 3] King PVII-1, at 425, 408-13. The Report accompanying S. 2266 referred to § 541(c)(2) as applying to "restrictions on a transfer of a spendthrift trust." S. Rep. No. 989, 95th Cong., 2d Sess. 83 (1978), *reprinted in* 1978 U.S. Code Cong. & Ad. News 5787, 5869. Interestingly, the Report noted the committee's objection to the provisions of H.R. 8200 that allowed a debtor to choose either state or federal exemptions and set too-liberal dollar amounts for the federal exemptions: "The committee feels that the policy of the bankruptcy law is to provide a fresh start, but not instant affluence, as would be possible under the provisions of H.R. 8200." *Id.* at 6, *reprinted in* 1978 U.S. Code Cong. & Ad. News 5787, 5792. The Senate committee's concern about "instant affluence" reminds us of the $355,578.00 Dr. Velis would have retained free and clear of his creditors' claims under the minority view adopted by the Sixth Circuit in this case. *See* p. 11, *supra*.

After Senate passage of S. 2266, floor managers from both houses met to engineer a compromise. The compromise bill was introduced in the House as H.R. 8200 as an amendment in the nature of a substitute to the Senate amendment to original H.R. 8200. *See* [Appendix 3] King PIX-1. This compromise bill was eventually passed by both houses and became the Bankruptcy Code. One of the House floor managers, Rep. Don Edwards of California, explained the compromise on § 541(c)(2): "Section 541(c)(2) follows the position taken in the House bill and rejects the position taken in the Senate amendment with respect to income limitations on a spend-thrift trust." 124 Cong. Rec. H11,096 (daily ed. Sept. 28, 1978) (statement of

Rep. Edwards). The exemption provision of the compromise bill also retained the basic structure of H.R. 8200 while eliminating the provisions so offensive to the Senate. *Id.* at H11,095 (statement of Rep. Edwards).

Thus, in the Bankruptcy Code Congress retained a necessary support limitation for exemption of a debtor's ERISA-qualified interests but eliminated it for exclusion of trusts. *Compare* 11 U.S.C. § 522(d)(10)(E) *with id.* § 541(c)(2). Obviously, the framers of Bankruptcy Code §§ 522(d)(10)(E) and 541(c)(2) consciously treated the matter of exclusion and exemption differently and separately and expressly provided that trusts would be dealt with as a matter of *exclusion* and that ERISA-qualified interests would be dealt with as a matter of *exemption*. This treatment of ERISA-qualified interests as a matter of exemption rather than exclusion is supported by the 1991 amendments to the Official Forms. On Official Form 6 (schedules to accompany the bankruptcy petition), a new category has been added to Schedule B – Personal Property; the debtor must now specifically "itemize" all "Interests in IRA, ERISA, Keogh, or other pension or profit sharing plans." Official Form 6, Schedule B – Personal Property, Item 11. *See id.* Advisory Committee Note – 1991 Amendments. An itemization of an ERISA-qualified pension interest would appear to be futile if the Advisory Committee had felt that the interest is excluded from the debtor's bankruptcy estate.

In addition to subverting Congress' intention, the minority view undermines the basic policy and purpose of the Bankruptcy Code. As the Senate committee noted, the bankruptcy laws are intended to give debtors a "fresh start, but not instant affluence." S. Rep. No. 989, 95th

Cong., 2d Sess. 6 (1978), *reprinted in* 1978 U.S. Code Cong. & Ad. News 5787, 5792. Treating ERISA-qualified pension interests as a matter of exemption rather than exclusion, as Congress intended, will accomplish this goal. For example, in *In re Velis*, 123 B.R. 497 (D.N.J. 1991), the district court held that Dr. Velis' $355,578.00 in ERISA-qualified interests were part of the bankruptcy estate. *Id.* at 509-10. Because New Jersey has not "opted out" of the federal exemption scheme, the court next applied the "necessary support" test under § 522(d)(10)(E) to determine the extent of the debtor's exemption. The court found that the ERISA interests were not "reasonably necessary for the support of the debtor and any dependents of the debtor" because their annual expenses of $71,950.00 could easily be met by the debtor's and his spouse's combined income of approximately $103,000.00 per year. *Id.* at 513. Thus, by adopting the majority view on the § 541(c)(2) question, the court was able to move on to a consideration of the debtor's peculiar circumstances to determine how much of the ERISA-qualified fund should be available to creditors. Yet, if the *Velis* court had adopted the minority position, the inquiry would have stopped with the determination that the funds were ERISA-qualified. As a result, after his bankruptcy, Dr. Velis would have retained all of the $355,578.00 in his ERISA-qualified plans, and would also have had his and his spouse's $103,000.00 annual income, free and clear from his creditors' claims.

The result in *Velis* can profitably be contrasted with the result in a recent Fourth Circuit case, *Shumate v. Patterson*, 943 F.2d 362 (4th Cir. 1991). In *Shumate*, the debtor was the 96% shareholder in his employer, the

Coleman Furniture Co. The debtor owned an interest in an ERISA-qualified pension plan financed solely by company contributions. Although other company employees participated in the plan, the debtor's interest was by far the largest, valued at $250,000.00 at the time of his bankruptcy. *Id.* at 363. The trustee urged the Fourth Circuit to modify the minority view it adopted in *In re Moore* because the debtor's degree of control over the plan was so great. As the Fourth Circuit noted:

> The evidence is that [the debtor] held 96% of the stock of the company, that he could vote in or out all the board of directors, that the board could terminate the pension plan at any time, and that he would personally benefit from any reversion from the plan upon termination.

Id. at 364. However, the Fourth Circuit refused to engage in any particularized inquiry into the nature or status of the pension interest beyond finding it to be ERISA-qualified. As the court admitted, the minority view that ERISA-qualified interests are excluded from the bankruptcy estate "rests not on the reality of the particular beneficiary-settlor-trust relationship in issue, but instead on the status of the plan as ERISA-qualified." *Id.* at 365. This illuminating statement underscores the absurdity of the minority position. Congress prescribed a particularized "reasonably necessary for support" test before ERISA-qualified pension interests can be exempted; yet the minority view holds that Congress also intended that such interests could be totally excluded from the estate without regard to the particular facts of the case. Such conflicting intentions should not be ascribed to Congress by mere construction.

The majority view refuses to give such talismanic power to the term "ERISA-qualified." The majority view requires an examination of the terms of each pension plan; the ERISA-qualified interest will still be excluded from the bankruptcy estate under § 541(c)(2) if it meets the requirements of a spendthrift trust under state law. While the minority view ensures that an ERISA-qualified interest will *never* become property of the estate, the majority view does not mean that an ERISA-qualified interest will *always* become property of the estate. The majority view more reasonably concludes that Congress intended to exclude an ERISA-qualified interest from the estate *only* if it also meets the requirements of a spendthrift trust. As the court noted in *Christison v. Slane (In re Silldorff)*, 96 B.R. 859, 863 (C.D. Ill. 1989),

> If a bankruptcy trustee can never reach funds held in an ERISA-qualified pension plan, then there is too much room for manipulation by a participant anticipating bankruptcy. On the other hand, if creditors were always able to reach the funds, ERISA's protection of retirement plans would be impermissibly diluted. The spendthrift trust rule allows for consideration of both statutory schemes, protecting debtor and creditor alike.

This possibility of manipulation exemplified so well in *Shumate v. Patterson* also refutes the minority's insistence that its position best furthers the purpose of ERISA. It is true that a purpose of ERISA is "to ensure that employees and their beneficiaries would not be deprived of anticipated retirement benefits . . . ' . . . upon retirement. . . . ' " *In re Lucas*, 924 F.2d at 602 (quoting *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 214 (1986)

(quoting *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 720 (1984))). However, the mere fact that a plan is "ERISA-qualified" does not mean that the beneficiary can reach the funds only upon retirement. As in *Shumate v. Patterson*, individual debtors can use a corporate entity over which they exert control to establish an ERISA-qualified plan, which they can then terminate post-bankruptcy. The majority view obviates this danger of abuse by applying the spendthrift trust test to ERISA-qualified plans. Indeed, it is the majority view, rather than the minority, which best promotes ERISA's purpose of ensuring retirement benefits.

It is clear, therefore, that the minority view represented by the Sixth Circuit's decision in this case permits the result Congress never intended of allowing a debtor to retain assets not necessary for the reasonable support needs of himself and his dependents. It allows debtors not just a "*fresh* start," but a "*head* start." *Lines v. Frederick*, 400 U.S. 18, 21 (1970) (Harlan, J., dissenting) (emphasis in original). It produces results inconsistent with the policies of the Bankruptcy Code and contravenes Congress' intent in both the Bankruptcy Code and ERISA.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

January 8, 1992.

Respectfully submitted,

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No. _____

In The

Supreme Court of the United States

October Term, 1991

IN RE: PATRICK F. MESSING, AND NORA B. MESSING,

Debtors

ANN MOSTOLLER, TRUSTEE,

Petitioner,

vs.

PATRICK F. MESSING,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

APPENDIX A

No. 91-5087

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

IN RE: **PATRICK F. MESSING;** **NORA B. MESSING** Debtors.	NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court. *This notice is to be prominently displayed if this decision is reproduced.*
ANN MOSTOLLER, Trustee, Plaintiff-Appellee, v. **PATRICK F. MESSING,** Defendant-Appellant, **NORA B. MESSING,** Defendant.	**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE** (Filed Sep. 24, 1991)

BEFORE: KENNEDY and JONES, Circuit Judges, and HARVEY, District Judge.*

* The Honorable James Harvey, United States District Court for the Eastern District of Michigan, sitting by designation.

PER CURIAM. Appellant-Debtors Patrick F. and Nora B. Messing ("Debtor") appeal the district court's order reversing the bankruptcy court's decision granting the debtor an exemption for the proceeds of an employee pension plan. For the reasons that follow, we reverse.

I.

On July 12, 1989, the debtor filed a petition for relief under Chapter 7 of the United States Bankruptcy Code ("the Code"). In their bankruptcy petition, the debtor claimed an exemption of the proceeds of Patrick Messing's ERISA-qualified pension plan in the amount of $6,365.45. On December 17, 1989, the bankruptcy trustee ("the Trustee") filed an objection to the debtor's claim of exemption for Patrick's pension plan proceeds.

On February 7, 1990, the parties filed written stipulations of fact with regard to the debtor's claim of exemption and the trustee's objection. The relevant facts stipulated to included: (i) that the debtor is the beneficiary of an ERISA-qualified pension plan which meets the requirements of §§ 401(a) and 401(k) of the Internal Revenue Code, 26 U.S.C. §§ 401(a) and 401(k); (ii) that the debtor's ERISA-qualified plan contains the anti-assignment and anti-alienation provisions required by 29 U.S.C. § 1056(d) and § 401(a)(13) of the Internal Revenue Code, 26 U.S.C. § 401(a)(13); and (iii) that the balance in the debtor's plan as of the date of filing bankruptcy was $6365.45.

Based upon the aforementioned stipulations of fact and the respective memoranda of law submitted by the parties, the bankruptcy court entered an order granting

the debtor's claim of exemption under ERISA § 206(d) and § 522(b)(2)(A) of the Code, 11 U.S.C. § 522(b)(2)(A). The trustee appealed the bankruptcy court's decision to the district court, and on December 13, 1990, the district court reversed, holding that the debtor could not exempt his ERISA plan benefits from the reach of creditors under 11 U.S.C. § 522(b)(2)(A). This timely appeal followed.

II.

The debtor raises two contentions on appeal. The first is that this court's opinion in *In re Lucas*, 924 F.2d 597, 598 (6th Cir. 1991) is dispositive of this appeal because in that case we determined that ERISA plan benefits were excluded from a debtor's estate under the bankruptcy code, and hence were not subject to the reach of creditors in a bankruptcy. In the alternative, the debtor suggests that even if ERISA benefits are properly considered part of a bankrupt's estate, they are exempt from creditor's reach under 29 U.S.C. § 1056(d) of ERISA and 11 U.S.C. § 522(b)(2)(A) of the bankruptcy code. As we find the debtor is correct in his assertion that *Lucas* is dispositive of this appeal, we do not reach the question of whether ERISA provides an exemption for pension benefits from a bankrupt's estate.

In *Lucas*, the debtor claimed an exclusion of some $6000.00 in pension benefits based upon 11 U.S.C. § 541(c)(2) and 29 U.S.C. § 1056(d). The trustee objected and claimed a right to the funds. This court, following the minority interpretation of the relevant law, reasoned as follows. Section 541(c)(2) of the Code provides that "[a] restriction on the transfer of a beneficial interest of the

debtor in a trust that is enforceable under *applicable nonbankruptcy law* is enforceable in a case under this title." 11 U.S.C. § 541(c)(2) (emphasis added). The court found § 541(c)(2) to be an explicit exception to the broad definition of a bankrupt's estate under § 541(a)(1).[1] 924 F.2d at 600. The debtor argued, as he does in the instant case, that the non-transfer provision of ERISA, 26 U.S.C. § 1056(d), was an enforceable "applicable nonbankruptcy law" under § 542(c)(2) [sic], and therefore ERISA-qualified pension benefits met the requirement for exclusion under § 542(c)(2) [sic]. This court agreed, rejecting the analysis of four other circuits which had held that "applicable nonbankruptcy law" was not meant to include ERISA. 924 F.2d at 600-02. *See, e.g. In re Daniel*, 771 F.2d 1352, 1360 (9th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986); *In re Lichstrahl*, 750 F.2d 1488, 1490 (11th Cir. 1985).

In reaching its conclusion this court followed the Fourth Circuit's decision in *In re Moore*, 907 F.2d 1476 (4th Cir. 1990). In *Moore*, the court found that the plain language of § 541(c)(2) required the conclusion that it was meant to apply to all "applicable nonbankruptcy laws" and not just state trust law, as the majority of circuits had found. *Id.* at 1477. The court then went on to conclude that the non-assignment provision of ERISA was an enforceable transfer restriction and thus "applicable nonbankruptcy law" within the meaning of § 541(c)(2). *Id.* at

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[1] 11 U.S.C. § 541(a)(1) defines the bankrupt's estate as "all legal or equitable interests of the debtor in property as of the commencement of the case."

1479-81. Thus, the court held that a debtor's ERISA pension benefits were properly excluded from the bankrupt's estate. *Id.*

We find the question raised by the debtor in this appeal is identical to the issue raised by the debtor in *Lucas*. Further, as the debtor in the instant case suggests, *Lucas* is dispostive of the issues before the court because a finding that the proceeds of the pension plan are excluded from the debtor's estate precludes any discussion of whether, if included in the estate, they should be exempted. Nevertheless, the appellees [sic] object to our deciding this appeal based upon *Lucas*.

First, they assert that the issue of an exclusion under § 541(c)(2) was not raised by the debtor below. While there is clearly a policy in the circuit of treating issues not raised below as waived for the purposes of appeal, the issue before us is one of pure law. Thus, deciding this case without reference to *Lucas* would require us to ignore the controlling law of this circuit on this issue and decide the case on other grounds. Further, were we to treat *Lucas* as waived and decide the case based upon an "exemption" analysis, it would lead to an absurd conclusion. In essence, we would be deciding that pension proceeds, which we have already decided are not properly part of a bankrupt's estate, nevertheless should be exempted or not when considered as part of the bankrupt's estate. We also find it significant that *Lucas* had yet not [sic] been decided when this case came before the courts below. Thus, we find the debtor's reliance on *Lucas* to be proper, though he did not raise this argument before the district court.

In the alternative, the appellees [sic] argue that *Lucas* was wrongly decided and invite this panel to reconsider that decision. Essentially, appellees [sic] present the same arguments rejected in *Lucas* and cite no new or controlling precedent which would lead us to question the continuing validity of *Lucas*. Even if we were so inclined, this court is not at liberty to reconsider its prior decisions except through the mechanism and procedures of *en banc* review or at the direction of the Supreme Court of the United States. The Supreme Court denied certiorari to the Sixth Circuit in *Lucas* sub nom. *Forbes v. Holiday Corp. Sav. & Ret. Plan*, 111 S.Ct. 2275 (1991). Hence, we find *Lucas* to be still good law and controlling in this case.

II. [sic]

Following *Lucas*, the debtor is entitled to a full exclusion of his ERISA pension benefits from his bankruptcy estate. Therefore, the decision of the district court in this case is **REVERSED** and the case is **REMANDED** for further proceedings in accordance with this opinion.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE NORTHERN DIVISION

IN RE
PATRICK F. MESSING and
NORA B. MESSING, Debtors

ANN MOSTOLLER, TRUSTEE	)	NO. CIV-3-90-601
	)	Bankruptcy No.
v.	)	3-89-01961
PATRICK MESSING, ET AL.	)	(Filed Dec. 13, 1990)

ORDER

In an Order entered July 11, 1990, the United States Bankruptcy Court for the Eastern District of Tennessee, allowed debtor Patrick F. Messing to claim an exemption, pursuant to 11 U.S.C. § 522(b)(2)(A), in all of the proceeds of his ERISA-qualified pension benefit plan established by his employer. Trustee Ann Mostoller appeals from this ruling, arguing that, according to all of the Circuit Courts of Appeal which have addressed this issue (the Fifth, Eighth, Ninth, and Eleventh), qualified pension benefits are not exempted from the reach of the Trustee and creditors.

The parties stipulate that the debtor is a beneficiary of a pension benefit plan established by his employer under § 401(k) of the Internal Revenue Code; that the plan is an ERISA-qualified plan which contains the anti-assignment and anti-alienation provisions required by ERISA at 29 U.S.C. § 1056(d) and the Internal Revenue Code at 26 U.S.C. § 401(a)(13); and that, on the date of his bankruptcy, the thirty-one year old debtor was not

receiving benefits under the plan nor had he ever made or received any withdrawals or distributions from the plan.

The debtor first claimed his exemption under Tennessee law pursuant to Tenn. Code Ann. § 26-2-104(b). The Bankruptcy Court held, correctly, that federal ERISA law, specifically 29 U.S.C. § 1144(a), preempts all state laws insofar as they relate to employee benefit plans. *Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825 (1988). The debtor does not pursue this argument on appeal.

In an alternative position, the debtor claimed his exemption under 11 U.S.C. § 522(b)(2)(A). That section of the Bankruptcy Code permits a debtor to choose either the federal exemptions listed at § 522(d) or those provided by state law and also "any property that is exempt under Federal (nonbankruptcy) law other than subsection (d) of this section." His argument was that the anti-alienation and anti-assignment provisions mandated by ERISA at 29 U.S.C. § 1056(d)(1) ("Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated") establish just the sort of federal nonbankruptcy exemption which should be available under § 522(b)(2)(A).

The legislative history of § 522(b) provides a list of "some of the items which may be exempted" under this section. The list includes such federally created benefits as Foreign Service Retirement and Disability payments, Social Security payments, injury or death compensation payments from war risk hazards, civil service retirement benefits, Longshoremen's and Harbor Workers' Compensation Act death and disability benefits and Veterans'

benefits. The four Circuit Courts that have ruled that ERISA's anti-alienation provisions do *not* establish a federal nonbankruptcy law exemption for ERISA-qualified plans have considered it indicative of congressional intent that this list, while it does not purport to be all-inclusive, does not mention ERISA plan benefits. They also point out that most of the property covered in the list is peculiarly federal in nature, either created by federal law or related to industries protected by the federal government. ERISA, on the other hand, regulates *private* employer pension plans. *See Daniel v. Security Pacific Nat'l Bank (In re Daniel)*, 771 F.2d 1352 (9th Cir. 1985); *Lichstrahl v. Bankers Trust (In re Lichstrahl)*, 750 F.2d 1488 (11th Cir. 1985); *Samore v. Graham (In re Graham)*, 726 F.2d 1268 (8th Cir. 1984); and *Goff v. Taylor (Matter of Goff)*, 706 F.2d 574 (5th Cir. 1983).

Judge Stair declined to follow the holdings of these courts, taking his guidance from the reasoning in two Sixth Circuit cases. In *General Motors Corp. v. Buha*, 623 F.2d 455 (6th Cir. 1980), the Sixth Circuit ruled that benefits under an ERISA-qualified plan are not subject to garnishment by a creditor of a plan beneficiary. In *United Metal Products Corporation v. National Bank of Detroit*, 811 F.2d 297 (6th Circuit), the Court refused to create an implied fraud exception to the pension anti-alienation provisions of ERISA and the Internal Revenue Code, even to redress a case of employee embezzlement from the plan. The Circuit Court adhered to the literal construction of the anti-alienation provisions, reasoning that "only when a literal construction of a statute yields results so manifestly unreasonable that they could not fairly be attributed to congressional design will an exception to

statutory language be judicially implied." *United Metal Products* at 300. Judge Stair concluded that, if faced with the question before the Court, the Sixth Circuit would accept the plain meaning of the anti-alienation provision to protect pension benefits from the reach of bankruptcy creditors. He also noted that several bankruptcy courts have taken this position, although they clearly hold a minority opinion. *See In re Conroy*, 110 B.R. 492 (Bnkr. D. Mont. 1990) (indicating that it would follow *Burns* and *Komet* if not bound by the Ninth Circuit decision in *Daniel); In re Burns*, 108 B.R. 308 (Bnkr. W.D. Okla. 1989); *In re Komet*, 104 B.R. 799 (Bnkr. W.D. Tex. 1989); and *In re Hinshaw*, 23 B.R. 233 (Bnkr. D. Kan. 1982).

On appeal the Trustee argues that the anti-alienation language in ERISA has been interpreted by the great majority of courts to pertain only to qualification for favorable tax treatment and not to create a federal exemption. She points out that when Congress has intended to exclude or exempt other property interests from bankruptcy estates it has usually done so with very specific language such as in the Social Security Act, 42 U.S.C. § 407 (" . . . none of the moneys paid or payable or rights existing under this title shall be subject to execution, levy, attachment, garnishment, or . . . to the operation of any bankruptcy or insolvency law.") or in the Veterans' Benefits Act, 38 U.S.C. § 3101(a) (payments of benefits due or to become due under any law administered by the Veterans' Administration . . . shall be exempt . . . ").

The Trustee also points out that ERISA, by its own terms, does not serve "to modify, impair or supersede" the provisions of other federal laws. 29 U.S.C. § 1144(d)

(1975). Therefore, while ERISA's anti-assignment language does preempt all *state* laws as they may relate to employee benefit plans, it cannot modify or supersede federal laws such as Bankruptcy Code § 541(a)(property of the estate). Under the Bankruptcy Code, all property of the debtor becomes part of the estate available to satisfy the creditor's claims. The debtor may then remove some of the property [by] claiming exemptions under 11 U.S.C. § 522(b) – either the exemptions provided by his state plus those exempt under federal nonbankruptcy law, *or* the exemptions provided by the bankruptcy act. One of the bankruptcy act exemptions does cover ERISA benefits, but this exemption is limited "to the extent reasonably necessary for the support of the debtor and any dependent of the debtor." 11 U.S.C. § 522(d)(10)(E). The Trustee argues that it would make no sense for the debtor to choose the more restrictive bankruptcy exemption of § 522(d)(10)(E), if there was an otherwise unlimited nonbankruptcy exemption under ERISA itself.

She also argues that if this Court accepts Judge Stair's reasoning, debtors in the Eastern District of Tennessee would be able to discharge all of their debts and yet keep, without limitation, all of their ERISA benefits. These benefits may have the nature of a savings account and, astute debtors will, in the future, attempt to retain the value of all of their assets by keeping them in or converting them into the form of pension interests.

In his brief on appeal, the Debtor advises the Court that, since the time of Judge Stair's ruling, the Supreme Court has refused to create an exception to ERISA's prohibition against assignment or alienation of pension benefits in order to create a constructive trust in favor of a

union, pursuant to the remedial provisions of the Labor-Management Reporting and Disclosure Act, in a [sic] another case involving embezzlement of union funds, *Guidry v. Sheet Metal Workers National Pension Fund*, ___ U.S. ___, 110 S.Ct. 680 (1990). In discussing the anti-alienation provision, the Supreme Court commented that,

> Section 206(d) reflects a considered congressional policy choice, a decision to safeguard a stream of income for pensioners (and their dependents, who may be, and perhaps usually are, blameless), even if that decision prevents others from securing relief for the wrongs done them. If exceptions to this policy are to be made, it is for Congress to undertake that task. *Guidry*, 110 S.Ct. at 687.

The debtor also advises us that, following *Guidry*, another bankruptcy court has joined the minority position and upheld a debtor's exemption of ERISA pension benefits. *In re Starkey*, 116 B.R. 259 (Bnkr. D. Colo. 1990).

While the Court must admit that both Judge Stair and the debtor make very good arguments and that the question is not an easy one, it has decided to adopt the majority position and reverse the bankruptcy court. There is no question that the anti-alienation language in ERISA was put there for income tax purposes and that Congress had no intention of creating a mechanism through which debtors could shelter money from the reach of bankruptcy creditors.

Accordingly, the bankruptcy court's ruling which allowed debtor Patrick F. Messing to claim an exemption, pursuant to 11 U.S.C. § 522(b)(2)(A), in all of the proceeds of his ERISA-qualified pension benefit plan is hereby

REVERSED and this action is REMANDED to the Bankruptcy Court for further proceedings.

ENTER:

/s/ Thomas G. Hull
THOMAS G. HULL
UNITED STATES
DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF TENNESSEE

In re

Case No. 3-89-01961

PATRICK F. MESSING
NORA B. MESSING

Debtors

MEMORANDUM ON TRUSTEE'S OBJECTION TO DEBTOR'S CLAIM OF EXEMPTION IN ERISA-QUALIFIED PENSION BENEFIT PLAN

APPEARANCES: Mostoller & Stulberg
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RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

The debtor, Patrick F. Messing, claims an exemption in the amount of $6,365.45 in an ERISA[1]-qualified pension benefit plan established by his employer.[2] The exemption is claimed under Tennessee law pursuant to Tenn. Code Ann. § 26-2-104(b) (Supp. 1989). Alternatively, the debtor claims the exemption under 11 U.S.C.A. § 522(b)(2)(A) (West 1979 & Supp. 1990). The trustee, Ann Mostoller, objects to the debtor's exemption, contending that Tenn. Code Ann. § 26-2-104(b) (Supp. 1989) is preempted by ERISA and that the debtor is not entitled to claim an exemption in an ERISA-qualified pension benefit plan under the "other Federal law" rubric of Bankruptcy Code § 522(b)(2)(A). All facts essential to a resolution of the issues before the court are embodied within written "Stipulations" filed February 7, 1990.

This is a core proceeding. 28 U.S.C.A. § 157(b)(2)(B) (West Supp. 1990).

I

The debtor and trustee stipulate the following material facts:[3]

1. The debtor is a beneficiary of a pension benefit plan (Plan) established by his employer under § 401(k) of

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[1] Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (codified at 29 U.S.C.A. §§ 1001, *et seq.* (West 1985 & Supp. 1990) and in various provisions of the Internal Revenue Code).

[2] All references to "the debtor" throughout this Memorandum shall be to Patrick F. Messing.

[3] "Stipulations" material to the issues in dispute are synopsized rather than quoted verbatim.

the Internal Revenue Code (IRC) (26 U.S.C.A. § 401(k) (West Supp. 1990)).

2. The Plan is an ERISA-qualified plan, qualifying under IRC § 401(a) (26 U.S.C.A. § 401(a) (West Supp. 1990)).

3. The Plan contains the anti-assignment and anti-alienation provisions required by ERISA § 206(d) (29 U.S.C.A. § 1056(d) (West Supp. 1990)) and IRC § 401(a)(13) (26 U.S.C.A. § 401(a)(13) (West Supp. 1990)).

4. The debtor's interest in the Plan on July 12, 1989, the date he and his wife filed their joint petition under Chapter 7, was $6,365.45.

5. On the date his bankruptcy petition was filed, the debtor was thirty-one years old, employed by J.B.F. Associates, Inc., was not receiving benefits under the Plan, and had never made or received any withdrawals or distribution from the Plan.

II

PREEMPTION OF TENN. CODE ANN. § 26-2-104(b) (Supp. 1989) BY ERISA

The Tennessee exemption statute relied upon by the debtor, Tenn. Code Ann. § 26-2-104(b) (Supp. 1989), provides in material part:[4]

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[4] Subsection (a) of this statute provides an exemption for state pension moneys. Subsection (c), in a manner consistent

(Continued on following page)

> (b) Except as provided in subsection (c), any funds or other assets payable to a participant or beneficiary from, or any interest of any participant or beneficiary in, a retirement plan which is qualified under §§ 401(a), 403(a), 403(b), and 408 of the federal Internal Revenue Code of 1986, as amended,[5] are exempt from any and all claims of creditors of the participant or beneficiary, except the state of Tennessee. . . .

This court, adhering to the United States Supreme Court's decision in *Mackey v. Lanier Collections Agency & Service, Inc.*, 486 U.S. 825, 108 S. Ct. 2182, 100 L.Ed.2d 836 (1988), has previously held that Tenn. Code Ann. § 26-2-111(1)(D) (1980),[6] which also provides for an

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with ERISA § 206(d) and IRC § 401(a)(13), provides that "[a]ny plan . . . described in subsection (b) . . . is not exempt from the claims of an alternate payee under a qualified domestic relations order."

[5] Provisions of the Internal Revenue Code as referred to in subsection (b) are improperly joined in the conjunctive rather than the disjunctive. The statute will be construed in accordance with the obvious intention of the drafters – §§ 401(a), 403(a), 403(b) and 408 shall be deemed joined in the disjunctive rather than the conjunctive. Therefore, each section stands independent of the other. *In re Martin*, 102 B.R. 639, 645-46 (Bankr. E.D. Tenn. 1989).

[6] Tenn. Code Ann. § 26-2-111 (1980) provides in material part:

> [T]he following shall be exempt from execution, seizure or attachment in the hands or possession of any person who is a bona fide citizen permanently residing in Tennessee:

(Continued on following page)

exemption in ERISA-qualified pension and profit sharing plans, "relates to" ERISA and is therefore preempted by ERISA. *In re Sellers*, 107 B.R. 152 (Bankr. E.D. Tenn. 1989). Tenn. Code Ann. § 26-2-104(b) (Supp. 1989) "relates to"

(Continued from previous page)

(1) The debtor's right to receive:

. . . .

(D) To the same extent that earnings are exempt pursuant to § 26-2-106, a payment under a stock bonus, pension, profitsharing, annuity, or similar plan or contract on account of death, age or length of service, unless:

(i) Such plan or contract was established by or under the auspices of an insider that employed the debtor at the time that the debtor's rights under such plan or contract arose;

(ii) Such payment is on account of age or length of service; and

(iii) Such plan or contract does not qualify under Section 401(a), 403(a), 403(b), 408 or 409 of the Internal Revenue Code of 1954 (26 U.S.C. 401(a), 403(a), 403(b), 408 or 409).

Provided, however, that the assets of the fund or plan from which any such payments are made, or are to be made, are exempt only to the extent that the debtor has no right or option to receive them except as monthly or other periodic payments beginning at or after age fifty-eight (58). Assets of such funds or plans are not exempt if the debtor may, at his option, accelerate payment so as to receive payment in a lump sum or in periodic payments over a period of sixty (60) months or less.

ERISA and for the reasons discussed by the court in *Sellers*, must also fall to ERISA's preemption provisions.

The Supreme Court in *Mackey* held that a Georgia statute exempting ERISA-qualified welfare benefit plans from garnishment was preempted by ERISA. The Court struck down the Georgia statute on the strength of ERISA § 514(a) (29 U.S.C.A. § 1144(a) (West 1985)), which provides in material part:

> (a) Supersedure; effective date
>
> Except as provided in subsection (b) of this section, the provisions of this subchapter [ERISA title I][7] and subchapter III [ERISA title IV] of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan[8] described in section 1003(a) of this title and not exempt under section 1003(b) of this title. . . .

The Court, in its discussion of ERISA § 514(a) and its effect on the Georgia statute under consideration, stated:

> ERISA § 514(a) pre-empts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by the statute. . . .
>
> The Georgia statute at issue here expressly refers to – indeed, solely applies to – ERISA employee benefit plans. . . . "A law 'relates to'

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[7] *See infra* note 10.

[8] ERISA § 3(3) (29 U.S.C.A. § 1002(3) (West Supp. 1990)) defines "employee benefit plan" to mean "an employee welfare benefit plan or an employee pension benefit plan. . . . "

> an employee benefit plan, in the normal sense of the phrase, if it has a connection with *or reference to* such a plan." On several occasions . . . we have reaffirmed this rule, concluding that state laws which make "reference to" ERISA plans are laws that "relate to" those plans within the meaning of § 514(a). In fact, we have virtually taken it for granted that state laws which are "specifically designed to affect employee benefit plans" are preempted under § 514(a). (emphasis in original).
>
> "The pre-emption provision [of § 514(a)] . . . displace[s] all state laws that fall within its sphere, *even including state laws that are consistent with ERISA's substantive requirements.*" . . . Legislative "good intentions" do not save a state law within the broad pre-emptive scope of § 514(a). (emphasis added).

108 S. Ct. at 2185 (citations omitted).

Bankruptcy Judge Leif M. Clark has observed that "[i]t is simply not possible to evade the clear mandate [of *Mackey*] that a law which 'makes reference to' an ERISA plan faces pre-emption under Section 514(a)." *In re Komet*, 104 B.R. 799, 801 (Bankr. W.D. Tex. 1989). Tenn. Code Ann. § 26-2-104(b) (Supp. 1989) "makes reference to" an ERISA plan. The ability of a plan "participant or beneficiary" to rely upon the Tennessee statute in dispute is dependent upon whether the plan is qualified under IRC §§ 401(a), 403(a), 403(b), or 408. IRC § 401(a) refers to ERISA-qualified pension, profit-sharing and stock bonus plans; IRC §§ 403(a) and (b) (26 U.S.C.A. § 403(a) & (b) (West Supp. 1990)) refer to ERISA-qualified annuities;

and IRC § 408 (26 U.S.C.A. § 408 (West Supp. 1990)) refers to individual retirement accounts.[9]

The major qualification issue raised in IRC §§ 401(a) and 403(a) and (b) is whether the plan comports with the labor law provisions of ERISA title I.[10] A stock bonus, pension or profit sharing plan which does not comply with the labor law provisions of ERISA title I cannot be a qualified plan under IRC § 401(a).[11] Thus, the reference in

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[9] Three types of individual retirement accounts are defined under IRC § 408(a), (b), and (c). This court has held that individual retirement accounts under IRC § 408(a) do not originate under title I of ERISA and are, therefore, outside the preemptive scope of ERISA § 514(a). *In re Martin*, 102 B.R. 639 (Bankr. E.D. Tenn. 1989). Whether or not individual retirement accounts established under IRC § 408(b) and/or (c) are also outside the preemptive scope of ERISA § 514(a) is not germane to the issues the court is called upon to address within the context of this Memorandum.

[10] Title I of ERISA, codified as Subchapter I of title 29 of the United States Code (29 U.S.C.A. § 1001 to 1168 (West 1985 & Supp. 1990)), embodies the labor law provisions of ERISA governing, inter alia, reporting and disclosure requirements, participation and vesting, funding, fiduciary responsibility, and administration and enforcement. Title II of ERISA, codified at various sections of title 26 of the United States Code, deals with amendments or additions to the Internal Revenue Code which impose requirements a plan must meet in order to provide the tax advantages and benefits of a qualified plan. The provisions of title II of ERISA are not embodied within the preemptive scope of ERISA § 514(a), quoted *supra* at p. 6.

[11] However, ERISA § 4(b) (29 U.S.C.A. § 1003(b) (West 1985)) exempts the following employee benefit plans from coverage under ERISA title I: governmental plans; church plans for which no election has been made under IRC § 410(d); plans maintained solely for the purpose of complying with

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Tenn. Code Ann. § 26-2-104(b) (Supp. 1989) to "a retirement plan which is qualified under . . . § 401(a)" incorporates and thus "relates to" ERISA title I. *See In re Komet*, 93 B.R. 498, 500 (Bankr. W.D. Tex. 1988).

The Tennessee exemption statute in dispute seeks to exempt the interest of a beneficiary in a qualified retirement plan from "all claims of creditors . . . *except the state of Tennessee.*" (emphasis added). ERISA § 206(d) (29 U.S.C.A. § 1056(d) (West Supp. 1990)), embodied within the provisions of ERISA title I, provides at paragraph (1) that "[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated." The Tennessee statute, by providing an exemption from all claims of creditors "except the state of Tennessee," purports to regulate ERISA-qualified pension benefit plans in a manner in derogation of ERISA § 206(d)(1). "The pre-emption provision . . . displace[s] all state laws that fall within its sphere, even including state laws that

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workmen's compensation laws, unemployment compensation laws, or disability insurance laws; plans maintained outside the United States primarily for the benefit of persons substantially all of whom are nonresident aliens; and unfunded plans maintained by employers primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees. *See In re Bowman*, 109 B.R. 789 (Bankr. E.D. Tenn. 1990) (Retirement plans embodied within Tennessee Valley Authority Retirement system, although qualified plans under IRC § 401(a), are "governmental plan[s]" not subject to the provisions of ERISA title I. Such plans are, therefore, not subject to the preemptive effect of ERISA § 514(a) and benefits therefrom are exempt under Tenn. Code Ann. § 26-2-104(b) (Supp. 1989)).

are consistent with ERISA's substantive requirements." *Mackey*, 486 U.S. at ___, 108 S. Ct. at 2185, 100 L.Ed.2d at ___, *citing Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 105 S. Ct. 2380, 85 L.Ed.2d 728 (1985). Tenn. Code Ann. § 26-2-104(b) (Supp. 1989) cannot even lend itself to the argument, albeit rejected by *Mackey*, that the statutory reference to ERISA is consistent with the purposes of ERISA. The statute, in its application to ERISA-qualified pension benefit plans, is clearly inconsistent with ERISA § 206(d)(1).

Tenn. Code Ann. § 26-2-104(b) (Supp. 1989) allows the debtor to exempt his interest in the Plan only if the Plan is qualified under IRC §§ 401(a), 403(a), 403(b), or 408. The parties stipulate that the Plan is qualified under IRC § 401(a). Based on the Supreme Court's decision in *Mackey*, Tenn. Code Ann. § 26-2-104(b) (Supp. 1989) is preempted by ERISA to the extent the statute purports to allow an exemption in an ERISA title I "retirement plan" qualified under IRC § 401(a). Accordingly, the debtor may not rely on the Tennessee statute to exempt his interest in the plan in dispute in this contested proceeding. Other courts have held in a consistent manner. *See, e.g., Deposit Guaranty Nat'l Bank v. McLeod (In re McLeod)*, 102 B.R. 60 (Bankr. S.D. Miss. 1989) (Mississippi statute exempting ERISA-qualified retirement fund from seizure preempted by ERISA); *Penick v. Hirsch (In re Hirsch)*, 98 B.R. 1 (Bankr. D. Ariz. 1988) (Arizona statute exempting ERISA-qualified pension plans from execution preempted by ERISA); *In re Brown*, 95 B.R. 216 (Bankr. N.D. Okla. 1989) (Oklahoma statute exempting ERISA-qualified pension plans preempted by ERISA). *Contra, In re Volpe*, 100 B.R. 840

(Bankr. W.D. Tex. 1989) (Texas statute exempting ERISA-qualified benefit plans not preempted by ERISA).

For the reasons set forth above, the trustee's objection to the debtor's claim of an exemption under Tenn. Code Ann. § 26-2-104(b) (Supp. 1989) is sustained. The debtor's exemption under the Tennessee statute will be disallowed.

III

EXEMPTION UNDER CODE § 522(b)(2)(A)

Bankruptcy Code § 522(b)(2)(A) provides in material part:

> (b) Notwithstanding section 541 of this title, an individual debtor may exempt from property of the estate the property listed in either paragraph (1) or, in the alternative, paragraph (2) of this subsection. . . . Such property is –
>
> . . . .
>
> (2)(A) any property that is exempt under Federal law, other than subsection (d) of this section,[12] or State or local law that is applicable on the date of the filing of the petition. . . .

11 U.S.C.A. § 522(b)(2)(A) (West 1979 & Supp. 1990).

The debtor contends that since the Plan is a qualified plan containing the requisite anti-alienation and anti-assignment provisions mandated by ERISA § 206(d)(1)

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[12] Tennessee opted out of the federal scheme of exemptions in 1980. Tenn. Code Ann. § 26-2-112 (1980).

and IRC § 401(a)(13), the Plan is exempt under the "other Federal law" rubric of § 522(b)(2)(A).[13]

A review of the reported decisions dealing with this question indicates that few courts agree with the debtor's position. *In re Burns*, 108 B.R. 308 (Bankr. W.D. Okla. 1989); *In re Komet*, 104 B.R. 799 (Bankr. W.D. Tex. 1989); *In re Hinshaw*, 23 B.R. 233 (Bankr. D. Kan. 1982). The majority of courts, including United States Courts of Appeals for the Fifth, Eighth, Ninth, and Eleventh Circuits, have concluded that ERISA § 206(d) does not establish a "Federal law" exemption for ERISA-qualified plans cognizable under § 522(b)(2)(A).[14]

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[13] ERISA § 206(d)(1) is quoted *supra* at p. 9. IRC § 401(a)(13) provides in material part at subparagraph (A) that "a trust shall not constitute a qualified trust under this section unless the plan of which such trust is a part provides that benefits provided under the plan may not be assigned or alienated. . . . " ERISA § 206(d) and IRC § 401(a)(13) do, however, permit the alienation of benefits under provisions of a "qualified domestic relations order." *See* ERISA § 206(d)(3) (29 U.S.C.A. § 1056(d)(3) (West Supp. 1990)) and IRC § 401(a)(13)(B) (26 U.S.C.A. § 401(a)(13)(B) (West Supp. 1990)).

[14] Recent noncircuit level cases concluding that ERISA § 206(d) does not establish a federal nonbankruptcy exemption include *In re Conroy*, 110 B.R. 492 (Bankr. D. Mont. 1990); *In re Alagna*, 107 B.R. 301 (Bankr. D. Colo. 1989); *In re Toner*, 105 B.R. 978 (Bankr. D. Colo. 1989); *Heitkamp v. Dyke (In re Dyke)*, 99 B.R. 343 (Bankr. S.D. Tex. 1989); *In re Gribben*, 84 B.R. 494 (Bankr. S.D. Ohio 1988); *In re Slezak*, 63 B.R. 625 (Bankr. W.D. Ky. 1986); *Gilbert v. Osburn (In re Osburn)*, 56 B.R. 867 (Bankr. S.D. Ohio 1986).

This court is persuaded that the language of § 522(b)(2)(A) is sufficiently broad to include an ERISA-qualified plan as "property that is exempt under Federal law."

The legislative history on § 522(b) provides in material part:

> Subsection (b), the operative subsection of this section, is a significant departure from present law. It permits an individual debtor in a bankruptcy case a choice between exemption systems. The debtor may choose the Federal exemptions prescribed in subsection (d), or he may choose the exemptions to which he is entitled under other Federal law and the law of the State of his domicile. If the debtor chooses the latter, some of the items that may be exempted under other Federal laws include:
>
> –Foreign Service Retirement and Disability payments, 22 U.S.C. 1104;
>
> –Social security payments, 42 U.S.C. 407;
>
> –Injury or death compensation payments from war risk hazards, 42 U.S.C. 1717;
>
> –Wages of fishermen, seamen, and apprentices, 46 U.S.C. 601;
>
> –Civil service retirement benefits, 5 U.S.C. 729, 2265;
>
> –Longshoremen's and Harbor Workers' Compensation Act death and disability benefits, 33 U.S.C. 916;
>
> –Railroad Retirement Act annuities and pensions, 45 U.S.C. 228(1);

> –Veterans benefits, 45 U.S.C. 352(E);
>
> –Special pensions paid to winners of the Congressional Medal of Honor, 38 U.S.C. 3101; and
>
> –Federal homestead lands on debts contracted before issuance of the patent, 43 U.S.C. 175.

H.R. Rep. No. 95-595, 95th Cong., lst Sess. 360 (1977); S. Rep. No. 95-989, 95th Cong., 2nd Sess. 75 (1978).

The Eighth Circuit has determined that ERISA is not "Federal law" upon which an exemption may be based under § 522(b)(2)(A). In discussing the illustrative list of property which might be exempted under "other Federal law" as set forth in the House and Senate Reports, the court stated that the "list was not meant to be exclusive" but found "the failure of Congress to include ERISA plan benefits probative of Congressional intent that ERISA was not a 'Federal law' upon which a § 522(b)(2)(A) exemption could be based." *Samore v. Graham (In re Graham)*, 726 F.2d 1268, 1274 (8th Cir. 1984).

The Fifth Circuit in *Goff v. Taylor (Matter of Goff)*, 706 F.2d 574 (5th Cir. 1983), a case relied upon by the Eighth Circuit in reaching its conclusion in *Graham*, also concluded that ERISA plans do not qualify for exemption under § 522(b)(2)(A). The *Goff* court stated:

> Congress did not "overlook" ERISA. Given the extensive and general reach of ERISA-qualified plans, it is highly improbable that Congress intended their inclusion without mention in the Section 522(b)(2)(A) exemption in the midst of a listing [in the legislative history] of significantly less comprehensive and less well known statutes. . . .

> We do not see across-the-board differences in the explicitness of the restraints against alienation in the listed statutes and in ERISA. But we do find that the contingent nature of ERISA's restraints on alienation differs markedly from the absolute prohibitions contained in the listed statutes [in the legislative history].

Id. at 585.[15]

The Eleventh Circuit, following *Goff* and *Graham* in also holding that ERISA does not provide an exemption cognizable under § 522(b)(2)(A), stated:

> The House and Senate reports on § 522(b)(2)(A) provide a list of property that can be exempted under federal laws. ERISA-qualified pension plans are not included. Although Congress may not have intended the list to be exhaustive, the failure to include ERISA is nonetheless indicative of congressional intent. Congress knew of the much-debated and comprehensive statute when it issued the House and Senate reports on § 522(b)(2)(A) in 1977 and 1978, and yet it did not include ERISA in those reports. . . . The failure to mention ERISA in connection with § 522(b) was intentional. . . .
>
> The failure to mention ERISA in the legislative history accompanying § 522(b)(2)(A) is, therefore, both purposeful and reasoned.

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[15] Bankruptcy Judge Clark in *Komet* vigorously disagreed with the holding in *Goff* and concluded that ERISA § 206(d) is "other Federal law" within the purview of § 522(b)(2)(A). 104 B.R. 799. Judge Clark's opinion in *Komet* contains an extensive discussion and analysis in support of his conclusion that the Fifth Circuit's holding in *Goff* is incorrect. *Id.* at 808-16.

Lichstrahl v. Bankers Trust (In re Lichstrahl), 750 F.2d 1488, 1491 (11th Cir. 1985) (footnotes and citations omitted).

The Ninth Circuit has followed the decisions of the Fifth, Eighth, and Eleventh Circuits in *Goff*, *Graham*, and *Lichstrahl*, respectively. *Daniel v. Security Pacific Nat'l Bank (In re Daniel)*, 771 F.2d 1352 (9th Cir. 1985).

This court does not intend a detailed analysis of the four circuit level cases discussed above. The common thread running through each appears to be the reliance on legislative history as conclusive of a congressional intent that ERISA not be included as "other Federal law" embodied within § 522(b)(2)(A). To this court the clear language of § 522(b)(2)(A) belies such an interpretation. Further, it appears that the Supreme Court in *Mackey* has expressly characterized ERISA § 206(d)(1) as a federal exemption. The Court in *Mackey* observed:

> Where Congress intended in ERISA to preclude a particular method of state-law enforcement of judgments, or extend anti-alienation protection to a particular type of ERISA plan, it did so expressly in the statute. Specifically, ERISA § 206(d)(1) bars (with certain enumerated exceptions) the alienation or assignment of benefits provided for by ERISA *pension* benefit plans. . . .
>
> Section 206(d)(1) bars the assignment or alienation of pension plan *benefits*, and thus prohibits the use of state enforcement mechanisms only in so far as they prevent those benefits from being paid to plan participants. . . . [B]y contrast, [§ 514(a)] deals with State laws as they relate to *plans*. . . . But by adopting § 206(d)(1), Congress demonstrated that it could, where it wished to,

> stay the operation of state law as it affects only benefits and not plans. . . .
>
> [W]hen Congress was adopting ERISA, it had before it a provision to bar the alienation or garnishment of ERISA plan benefits, and chose to impose that limitation only with respect to ERISA pension benefit plans. . . .

Mackey, 486 U.S. at ___, 108 S. Ct. at 2188, 2189, 100 L.Ed.2d at ___ (emphasis in original).

Although influenced by the decisions out of the Fifth, Eighth, Ninth, and Eleventh Circuits, this court is satisfied that ERISA § 206(d)(1) establishes a "Federal law" exemption cognizable under § 522(b)(2)(A). The court accordingly declines to follow the holdings in *Graham, Goff, Lichstrahl,* and *Daniel*. In reaching this conclusion, the court is guided by decisions of the United States Court of Appeals for the Sixth Circuit.

The Sixth Circuit, by virtue of the preemption provision of ERISA § 514(a), has held that the anti-assignment and anti-alienation provisions of ERISA § 206(d)(1) and IRC § 401(a)(13) overrides the operation of state law garnishment statutes. *General Motors Corp. v. Buha*, 623 F.2d 455 (6th Cir. 1980). The court in *Buha*, in a broad discussion of ERISA, states in material part:

> ERISA was enacted, in part at least, to provide a uniform and systematic framework for regulation of employee benefit plans. It contains a provision for preemption of state laws. . . . Congress sought to establish minimum standards to assure "the equitable character of such plans and their financial soundness" in enacting ERISA. It is central to the statutory scheme that

ERISA not be subject to state and local laws which might frustrate its goals. This was emphasized by Representative Dent, Chairman of the Subcommittee on Labor of the House Committee on Education and Labor, who stated:

> Finally, I wish to make note of what is to many the crowning achievement of this legislation, the reservation to Federal authority the sole power to regulate the field of employee benefit plans. With the preemption of the field, we round out the protection afforded participants by eliminating the threat of conflicting and inconsistent state and local regulation. 120 Cong.Rec. 29197 (1974).

. . . .

Garnishment is not mentioned in ERISA. However, both ERISA and the section of the Internal Revenue Code (IRC) dealing with "qualified" pension, profit-sharing and stock bonus plans contain provisions against assignment or alienation of plan benefits. Nearly identical language in 29 U.S.C. § 1056(d)(1) (ERISA [§ 206(d)(1)]) and 26 U.S.C. § 401(a)(13) (IRC) requires plans to contain a provision that "benefits provided under the plan may not be assigned or alienated."

. . . .

The defendants contend that use of the words "assignment" and "alienation" in § 1056(d)(1) indicates that Congress intended to prohibit only voluntary acts by the pension plan beneficiaries. They point out that Congress has clearly prohibited garnishments and attachments when that is its intention. They list ten

different statutes in which Congress has made a distinction between voluntary assignments and involuntary encroachments on benefits by way of garnishment, execution, attachment, etc. This is a strong indication that Congress recognized the difference between voluntary and involuntary encroachments on benefit funds and has stated it specifically when both are forbidden. Nevertheless, Congress did use the word "voluntary" in specifying those assignments which qualify for the 10 per cent exception in § 1056(d)(2). This can reasonably be read as an indication that the preceding language in § 1056(d)(1) included all encroachments, both voluntary and involuntary.

. . . .

The Act [ERISA] provides for a division of authority in the issuance of regulations:

> (c) Extended application of regulations prescribed by Secretary of Treasury relating to minimum participation standards, minimum vesting standards, and minimum funding standards.
>
> Regulations prescribed by the Secretary of the Treasury under sections 410(a), 411, and 412 of Title 26 (relating to minimum participation standards, minimum vesting standards, and minimum funding standards, respectively) shall also apply to the minimum participation, vesting, and funding standards set forth in parts 2 and 3 of subtitle B of subchapter I of this chapter. Except as otherwise expressly provided in this chapter, the Secretary of Labor shall not prescribe other regulations under such parts, or apply the regulations prescribed

> by the Secretary of the Treasury under sections 410(a), 411, 412 of Title 26 and applicable to the minimum participation, vesting, and funding standards under such parts in a manner inconsistent with the way such regulations apply under sections 410(a), 411 and 412 of Title 26. 29 U.S.C. § 1202(c).
>
> . . . .
>
> Pursuant to this authority the Secretary of the Treasury issued Internal Revenue Service Regulation § 1.401(a)-13, which provides in part:
>
> > (b) *No assignment or alienation.*-(1) *General rule.* Under section 401(a)(13), a trust will not be qualified unless the plan of which the trust is a part provides that benefits provided under the plan may not be anticipated, assigned (either at law or in equity), alienated or subject to attachment, garnishment, levy, execution or other legal or equitable process. 26 C.F.R. § 1.401(a)-13 (1979).
>
> Moreover, Congress provided that regulations issued by the Treasury Department would apply to analogous employee benefit sections of Title I of the Act in the same areas. Since the regulation in question is a legislative rather than an interpretive regulation, it is required to be followed unless it was issued in excess of the statutory authority of the Secretary or was "arbitrary, capricious, or an abuse of discretion, or otherwise not in accordance with law." The regulation in question clearly passes this test.
>
> Giving the required effect to Reg. § 1.401(a)-13, *we conclude that pension plan benefits are not subject to garnishment*. . . . (emphasis added).

Id. at 459-63 (citations and footnotes omitted).

More recently, the Sixth Circuit, in refusing to establish an implied exception to the anti-alienation provisions of ERISA § 206(d)(1) and IRC § 401(a)(13) based upon fraud, stated:

> [A] fundamental purpose of ERISA [is] to insure that "if a worker has been promised a defined pension benefit upon retirement – and if he has fulfilled whatever conditions are required to obtain a vested benefit . . . he actually receives it."
>
> [W]hether an exception should be created is a question for legislative rather than judicial judgment. Only when a literal construction of a statute yields results so manifestly unreasonable that they could not fairly be attributed to congressional design will an exception to statutory language be judicially implied. . . .

United Metal Products Corp. v. National Bank of Detroit, 811 F.2d 297, 300 (6th Cir. 1987) (citing *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 510, 101 S. Ct. 1895, 1899, 68 L.Ed.2d 402, ___ (1981); *United States v. Rutherford*, 442 U.S. 544, 559, 99 S. Ct. 2470, 2479, 61 L.Ed.2d 68, ___ (1979)).

In construing § 522(b)(2)(A), this court must consider that "[i]t is an elementary rule of statutory construction that [courts] . . . initially look to the plain language of the statute to determine the meaning of legislation." *McBarron v. S & T Industries, Inc.*, 771 F.2d 94, 97 (6th Cir. 1985). *See Powell v. Tucson Air Museum Foundation of Pima County*, 771 F.2d 1309, 1311 (9th Cir. 1985) (when interpreting a statute, the plain meaning of the words used is

controlling in the absence of a clearly expressed legislative intent to the contrary). The Sixth Circuit has observed:

> The primary function of the courts in construing legislation is to effectuate the legislative intent. *Philbrook v. Glodgett*, 421 U.S. 707, 713, 95 S. Ct. 1893, 1898, 44 L.Ed.2d 525 (1975). Legislative intent may be ascertained from the clear language of the statute itself or from available legislative materials which clearly reveal this intent. Where the literal language of the statute does not conclusively reveal legislative intent, the courts must look beyond literal meaning, analyzing the provision in context with the whole. . . .

Ray v. Security Mutual Finance Corp. (In re Arnett), 731 F.2d 358, 360-61 (6th Cir. 1984). The Sixth Circuit has also stated:

> Our . . . task in determining the scope of [a] . . . statute is to examine its language. We note that "[i]f the statutory language is unambiguous, in the absence of a 'clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.' "

United States v. Premises Known as 8584 Old Brownsville Rd., 736 F.2d 1129, 1130 (6th Cir. 1984) (quoting *United States v. Turkette*, 452 U.S. 576, 580, 101 S. Ct. 2524, 2527, 69 L.Ed.2d 246, ___ (1981)). *See also United States v. Ron Pair Enterprises, Inc.*, ___ U.S. ___, 109 S. Ct. 1026, 103 L.Ed.2d 290 (1989) ("The plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters.'

Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571, 102 S. Ct. 3245, 3250, 73 L.Ed.2d 973 (1982)").

This court is satisfied that ERISA § 206(d)(1) establishes a "Federal law" exemption in an ERISA-qualified pension benefit plan available to a debtor who elects to claim his exemptions under § 522(b)(2)(A). The Supreme Court's decision in *Mackey* as well as the decisions of the Sixth Circuit in *Buha* and *United Metal Products*, by which this court is bound, mandate this conclusion. Further, the clear and unambiguous language of § 522(b)(2)(A) prohibits this court from reading the illustrative list of "other Federal law" in the legislative history to § 522(b)(2)(A) as anything more than it purports to be – a nonexclusive list indicative of what might qualify as "other Federal law" cognizable under § 522(b)(2)(A).

Judge Clark in concluding that Congress expressed no particular intent to limit a debtor's access to retirement benefits in § 522(b), stated:

> The overall structure of Section 522(b) manifests a congressional policy which generally *favors* debtors retaining their retirement benefits. The legislative history is effusive in according sufficient property to debtors for their fresh start. . . . [M]ost persuasively, the substantial reenactment of Section 6 of the Act in Section 522(b)(2)(A) indicates that Congress there also intended to continue prior law, which simply incorporated by reference such federal exemptions as might otherwise be available to the debtor absent bankruptcy. Under prior law, those statutes controlled the nature and extent of the exemption. The same rule of construction should also apply to Section 522(b)(2)(A).

> As Section 522(b)(2)(A) contemplates honoring existing exemptions available under "other federal law," . . . this court [is compelled] to honor as exempt the benefits accruing from ERISA-regulated plans which are in compliance with ERISA § 206(d)(1).
>
> . . . .
>
> [A]s discussed above, Section 6 of the Bankruptcy Act (from which . . . [§ 522(b)] of the Code was taken) deferred to non-bankruptcy exemption statutes with respect to the nature and extent of the exemptions a debtor could claim upon bankruptcy. Nothing in that section even vaguely suggested an intention to modify or limit the scope or operation of a given exemption in the bankruptcy context. Had Congress intended to depart from prior law, it would have had to have done so by choosing explicit *statutory* language. It is dangerous to rely upon illustrative lists in the legislative history to *add* such a limitation to the statute. *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 26, 97 S. Ct. 926, 941, 51 L.Ed.2d 124, 143 (1977); *Scripps-Howard Radio v. FCC*, 316 U.S. 4, 11, 62 S. Ct. 875, 880, 86 L.Ed. 1229, 1235 (1942).

In re Komet, 104 B.R. at 813-14 (emphasis in original) (footnote omitted).

IV

CONCLUSION

ERISA § 206(d)(1) and IRC § 401(a)(13) permit the debtor to claim as exempt under § 522(b)(2)(A) his interest in the ERISA-qualified § 401(k) Plan established by his employer. The trustee's objection to the debtor's claim of

an exemption under § 522(b)(2)(A) will, accordingly, be denied.

This Memorandum constitutes findings of fact and conclusions of law as required by Fed. R. Bankr. P. 7052. An appropriate order will be entered.

FILED: May 14, 1990.

BY THE COURT

/s/ Richard Stair, Jr.
Richard Stair, Jr.
UNITED STATES
BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF TENNESSEE

In re

Case No. 3-89-01961

PATRICK F. MESSING
NORA B. MESSING

Debtors

ORDER

For the reasons set forth in the Memorandum filed this date, the "Objection To Debtors' Amended Claim Of Exemption" filed December 7, 1989, by Ann Mostoller, Trustee, is sustained in part and denied in part. It is, accordingly, ORDERED as follows:

1. That the claim of the debtor, Patrick F. Messing, to an exemption pursuant to Tenn. Code Ann. § 26-2-104(b) (Supp. 1989) in the § 401(k) pension benefit plan established by J.B.F. Associates, Inc., is DENIED.

2. That the claim of the debtor, Patrick F. Messing, to an exemption pursuant to 11 U.S.C.A. § 522(b)(2)(A) (West 1979 & Supp. 1990) in the § 401(k) pension benefit plan established by J.B.F. Associates, Inc., is GRANTED.

3. That the $6,365.45 in the § 401(k) pension benefit plan established by J.B.F. Associates, Inc., is exempt to the debtor, Patrick F. Messing, under 29 U.S.C.A. § 1056(d)(1) (West Supp. 1990) and 26 U.S.C.A. § 401(a)(13) (West Supp. 1990).

ENTER: May 14, 1990.

BY THE COURT

/s/ Richard Stair, Jr.
RICHARD STAIR, JR.
UNITED STATES
BANKRUPTCY JUDGE

APPENDIX D

No. 91-5087

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IN RE: PATRICK F. MESSING; NORA B. MESSING,
Debtors

ANN MOSTOLLER, TRUSTEE, Plaintiff-Appellee, v. PATRICK F. MESSING, Defendant-Appellant, NORA B. MESSING, Defendant	ORDER (Filed Oct. 10, 1991)

BEFORE: KENNEDY and JONES, Circuit Judges; and HARVEY*, Senior United States District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc. The petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the

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* Hon. James Harvey sitting by designation from the Eastern District of Michigan

petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green, Clerk
Leonard Green, Clerk

APPENDIX E

11 U.S.C. § 541(a)(1), (c) (1988):

§ 541. Property of the estate

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

. . . .

(c)(1) Except as provided in paragraph (2) of this subsection, an interest of the debtor in property becomes property of the estate under subsection (a)(1), (a)(2), or (a)(5) of this section notwithstanding any provision in an agreement, transfer instrument, or applicable nonbankruptcy law –

(A) that restricts or conditions transfer of such interest by the debtor; or

(B) that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title, or on the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement, and that effects or gives an option to effect a forfeiture, modification, or termination of the debtor's interest in property.

(2) A restriction on the transfer of a beneficial interest of the debtor in a trust that is

enforceable under applicable nonbankruptcy law is enforceable in a case under this title.

11 U.S.C. § 522(b)(1), (d)(10)(E) (1988):

§ 522. Exemptions

. . . .

(b) Notwithstanding section 541 of this title, an individual debtor may exempt from property of the estate the property listed in either paragraph (1) or, in the alternative, paragraph (2) of this subsection. . . . Such property is –

(1) property that is specified under subsection (d) of this section, unless the State law that is applicable to the debtor under paragraph (2)(A) of this subsection specifically does not so authorize; . . .

. . . .

(d) The following property may be exempted under subsection (b)(1) of this section:

. . . .

(10) The debtor's right to receive –

. . . .

(E) a payment under a stock bonus, pension, profitsharing, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor, unless –

(i) such plan or contract was established by or under the auspices of an insider

that employed the debtor at the time the debtor's rights under such plan or contract arose;

(ii) such payment is on account of age or length of service; and

(iii) such plan or contract does not qualify under section 401(a), 403(a), 403(b), 408, or 409 of the Internal Revenue Code of 1986 (26 U.S.C. 401(a), 403(a), 403(b), 408, or 409).

26 U.S.C. § 401(a)(13) (1988):

§ 401. Qualified pension, profit-sharing, and stock bonus plans

(a) Requirements for qualification

. . . .

(13) ASSIGNMENT AND ALIENATION. –

(A) IN GENERAL. – A trust shall not constitute a qualified trust under this section unless the plan of which such trust is a part provides that benefits provided under the plan may not be assigned or alienated. . . .

29 U.S.C. § 1056(d)(1) (1988):

§ 1056. Form and payment of benefits

. . . .

(d) Assignment or alienation of plan benefits

(1) Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated.

29 U.S.C. § 1144(d) (1988):

§ 1144. Other laws

. . . .

(d) Alteration, amendment, modification, invalidation, impairment, or supersedure of any law of the United States prohibited

Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 1031 and 1137(c) of this title) or any rule or regulation issued under any such law.